No. 11,694

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SCIENTIFIC NUTRITION CORPORATION, d/b/a CAPOLINO PACKING CORPORATION,
Respondent,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L., and CALIFORNIA STATE COUNCIL OF CANNERY UNIONS, A.F.L.,
Intervenors.

BRIEF FOR RESPONDENT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The Facts.

At page 2 of the Board's Brief the Board states the question before the Court as follows:

> "The issue in this case, namely, whether the Board properly found that respondent violated Section 8 (1) and (3) of the Act (National Labor Relations Act, 49 Stat. 449, 29 U.S.C., Sec. 151

> et seq.) by rendering assistance to the Teamsters and by discharging an employee because he refused to join the Teamsters, turns upon the question whether, as respondent claims, it had a closed-shop contract with the Teamsters at the time of the discharge and the acts of assistance."

The Board then proceeds to argue that the question is identical with an issue raised in the pending case of *N.L.R. B. v. G. W. Hume Company,* number 11,693 in this Court, in that it depends on "whether the Master Agreement was a closed shop." This statement might well be correct if the "Green Book" or Master contract were the only measure of the contractual relationship between the parties. The record before the Court, however, and the matters presented by the Board in its Brief, raise a somewhat different question and require amplification of the facts as described by the Board. The record is without conflict on most of the material facts adduced at the hearing; the present difference between respondent and the Board results, we believe, from the Board's failure to consider uncontroverted and highly material evidence in the record, and in the Board's failure to make its conclusions of law dependent upon the record as a whole. Instead of submitting a complete restatement of the facts we shall set forth those which the Board has omitted from its Brief, following the outline adopted by the Board.

1. Early bargaining relations between respondent and Local 22382.

We agree with the Board's statements at pp. 3-4 of its brief that respondent made an agreement in 1941 with Local 22382, by which respondent adopted and agreed to be bound by the master contract established for the major portion of the California canning industry by California Processors and Growers, Inc., for the employers, and California State Council of Cannery Unions, for the various AFL cannery workers' unions. We likewise agree that this contractual arrangement remained in effect until the events of May, 1945. But we submit that the adoption of this "Green Book" contract, as it is commonly known, was not the total contract between respondent and Local 22382. In addition to a dues check off, which continued until the first of 1945 (Tr. 128), it was a condition of employment that all employees covered by the Green Book contract remain members in good standing in Local 22382. (Tr. 138, 141-42, 174, 198, 214.) Whether this union-shop or closed-shop condition existed as a matter of interpretation of the Green Book contract or as a collateral, verbal understanding between respondent and Local 22382 is immaterial; the fact is that such a condition existed down to May, 1945, and there is no inference that can be drawn from the record to the contrary. Such supplementary arrangements, adding conditions to the employment relationship not covered specifically by the Green Book contract, were quite common, particularly in the "independent" plants which were not affiliated with C. P. & G. An identical condition existed, for example, at Flotill Products, Inc., in Stockton, and is now be-

fore this Court in the matter of *National Labor Relations Board v. Flotill Products, Inc.,* number 11,449. The Board significantly makes no mention of this membership requirement in its analysis of the events of May, 1945.

2. The teamsters' assertion of jurisdiction over Local 22382.

As the Board notes (Brief, p. 4), Local 22382 was a Federal local union, chartered directly by the executive council of the American Federation of Labor. At a meeting of the executive council held from April 30, 1945 to May 8, 1945, the council ruled that jurisdiction over cannery workers should be assigned to the International Brotherhood of Teamsters because of existing teamster jurisdiction over cannery warehouse work. (Tr. 234.) As a result of this assignment of jurisdiction the international representative of the teamsters claimed successorship to the contractual agreement between Local 22382 and respondent by letter of May 8, 1945.

On May 10, 1945, a trustee was appointed for Local 22382 by William Green, president of the American Federation of Labor, to make sure that the assignment by the executive council was properly carried out. (Tr. 234.) Upon the refusal of the officers of Local 22382 to deliver its assets and properties to the trustee an action was commenced in the Superior Court in Stanislaus County to compel a proper transfer, and pending the hearing on an order to show cause the office of the old local was locked. Following

a final hearing an order was issued by the Court assigning the headquarters, assets, properties and funds of Local 22382 to the trustee. (Tr. 235.) Inasmuch as a contract between Local 22382 and respondent was an asset in which the local union had an interest the ultimate disposition of the law suit by the Superior Court gave full legal sanction to the executive council's assignment to the teamsters early in May, 1945.

3. Respondent's alleged assistance to the teamsters.

The Board has reviewed the events within the plant from May 14 to shortly after May 18.[1] With but minor exceptions the record presents no conflict as to what transpired during this period; where there is a conflict it has been resolved by the Trial Examiner, and we do not seek to upset his findings of fact on these matters. Our objection is to his conclusion that these events constituted a forbidden assistance to the Teamsters Union.

4. The discriminatory discharge of Gus Cedar.

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[1]In a number of instances the Board summarizes the record with considerably less objectivity than did the Trial Examiner in his Intermediate Report. For example, the Trial Examiner found (Tr. 43):

> "* * * After the meeting and while the employees were still in the warehouse, the Teamsters representatives went among the employees and solicited each one individually. That same afternoon the Teamsters presented signed membership applications of 13 of the employees to the respondent and demanded that the contract be signed."

States the Board upon the same record (Brief, p. 9):

> "After the speeches, the five Teamsters representatives who had attended the meeting circulated among the assembled employees, exhorted them to joint the Teamsters, solicited each one individually, and succeeded in inducing 13 employees to sign membership application cards."

As noted by the Board (Brief, p. 13) we agree that Gus Cedar was discharged because he was not a member in good standing of the Teamsters Union on June 22, 1945, and had not been theretofore. Our position is that upon the record before this Court the discharge did not constitute an unfair labor practice.

ARGUMENT.

A. THE EXECUTIVE COUNCIL'S JURISDICTIONAL AWARD OPERATED TO ASSIGN RESPONDENT'S CONTRACT TO THE TEAMSTERS' UNION.

1. Respondent had a valid closed shop with Local 22382.

Whatever may have been the precise contractual relationship between the parties in the case of *N.L.R.B. v. G. W. Hume Company,* number 11,693 this Court, there is no doubt that until May, 1945, respondent required membership in Local 22382 as a condition of employment. This requirement is not questioned anywhere in the record. (Tr. 174, 198, 214, 216-17.) Even the claimant Gus Cedar, a witness called by the Board, conceded that until May 18, 1945, all employees were members in good standing of Local 22382, and he did not know of any employees prior to that date who failed to maintain membership in good standing. (Tr. 138, 141-42.) This practice, whether reduced to writing or not, was as much a condition of the employment relationship and a part of the total collective bargaining agreement with Local 22382 as were the terms of the Green Book contract which had been adopted by reference in 1941. There

can be no question that such an agreement is valid under the Act even though not reduced to writing. *Matter of United Fruit Company,* 12 N.L.R.B. 404.

2. The Teamsters succeeded to the closed shop condition as well as to the Green Book.

By declaring that the validity of Gus Cedar's discharge hinges on the effect of the master agreement (Board's Brief pp. 2, 13, 14) the Board in effect agrees that the teamsters succeeded to the contract held by Local 22382, for without such successorship the Board's argument would depend only on the exclusive recognition memorandum executed on May 18, 1945. (Tr. 20.) This, quite obviously, sets forth nothing concerning substantive terms or conditions of employment, let alone a requirement of union membership.

The Board does not question the existence of the Green Book contract between the teamsters and respondent. In fact, the Board states that "the single issue in this case is whether the master agreement * * * was a closed-shop agreement, or, in the language of the proviso to Section 8 (3) of the Act, whether it required of respondent's employees membership in the teamsters 'as a condition of employment.'" Nowhere does the Board suggest that the teamsters were not a party to the Green Book contract with respondent. And inasmuch as there is nothing to indicate, by inference or otherwise, that the teamsters and respondent gave separate consideration to re-execution of the memorandum incorporating the Green Book

(or, for that matter, to the discussion of any other collective bargaining agreement), the Green Book can enter the picture on and after May 18, 1945, only upon the premise that the teamsters succeeded to the contract held by Local 22382.

But the Board omits a most substantial part of the contractual relationship from the development of its conclusion that employment was not conditioned upon union membership. The Board ignores the requirement, unquestionably existing until May 18, 1945, that employees be members in good standing of the AFL union if they were to secure or retain employment.[2] This requirement, as we have stated, was as much a part of the collective bargaining relationship as any section of the Green Book. There is no doubt that the teamsters intended to succeed to this condition along with the matters set out in the industry contract. In the letter of May 8, 1945, the teamsters made claim to inherit *the agreement* then in effect, and agreed that upon recognition of their "inheritance" they would "live up to *the agreement now in effect* to the latter." (Italics added.) The contractual relationship was not claimed piecemeal; it was claimed in its entirety. Upon this basis when the teamsters sent the recognition memorandum to respondent on May 17, 1945, they did not have to ask for a written

[2]The Board found (Tr. 34, Sec. 3) that "The contention that the parties understood and administered the contract as requiring membership in the Teamsters, is not supported by the evidence," and that there was no closed shop agreement with respondent. In view of the foregoing discussion we submit that these findings are wholly without evidentiary support.

agreement establishing a closed—or union shop, any more than they had to request a re-adoption of the Green Book contract. They merely asked respondent to inform employees that they had to become and remain members of the Teamsters Union, instead of Local 22382, as a contractual obligation running in favor of a successor organization. It was not a proposal made to respondent calling for acceptance and the creation of a new collective bargaining agreement. It was merely a concluding step in the procedure by which the teamsters stepped into the shoes of Local 22382.

B. RESPONDENT'S "ASSISTANCE" TO THE TEAMSTERS WAS REQUIRED UNDER ITS CONTRACT.

As the Board concedes, the Green Book contract was at least a part of the contractual relationship between respondent and Local 22382, and later with the teamsters. The assignment of the interest of Local 22382 to the teamsters occurred upon the rendition of the award of May 3, 1945, by the executive council of the American Federation of Labor. Thereafter the Teamsters Union was entitled to claim the benefits of the contract, a part of which was Section 11 of the Green Book, set forth in full in the appendix to the Board's brief, pages 29-55, particularly at page 44. The first sentence in this Section (captioned "Visits by Union Officials") is as follows:

> "The Employer agrees to admit to its plant at all reasonable times any authorized represen-

> tative, or representatives, of the Union for the purpose of ascertaining whether or not this agreement is being observed by the parties hereto, and to assist in adjusting grievances."

This paragraph gave teamster representatives the right to visit the plant to observe performance of the contract not only as to wages and hours, but also as to the compliance by the employer with the provisions of Section 3 (Board's Brief, pp. 31-35) relating to preference of employment and the necessity for proper application for union membership by new employees. With respect to employment of persons not having seniority in the plant, the Green Book contract obligated respondent to give first preference to unemployed union members. If such members were not available non-members could be hired, but only by making application for membership before going to work, and membership had to be completed within ten days of employment. Under Section 11 of the Green Book the teamster representatives had a right to be in the plant to see whether new employees belonged to the union, and their solicitation of membership would be a proper exercise of that right.

The Board argues that two types of activity constituted unlawful activity within the plant. First, the Board urges that the activities of the teamster representatives themselves, in addressing and soliciting the employees constituted improper conduct for which respondent is chargeable. The answer to this argument is that what the teamsters did, they did by rea-

son of their successorship to the contract, specifically under Section 11 of the Green Book. Teamster presence and conduct in the plant was no more improper than would have been such conduct by representatives of Local 22382 prior to May, 1945, particularly in the absence of a request for similar privileges by any other group.

Second, the Board argues that assistance given to teamster spokesmen by representatives of the respondent was a violation of the Act. To this there are two answers. For one, inasmuch as the teamsters succeeded to the old contract the statements attributed to Capolino and others could not have affected the result. The same issue was before the Board in *Matter of J. E. Pearce Contracting and Stevedoring Company,* 20 N.L.R.B. 1061, where the Board said (20 N.L.R.B. at 1074):

> "The respondent is charged with having supported Local 1576 in two other respects. Mrs. Pearce is alleged to have told employees as they came for their wages on or about July 15, 1938, that 'you'd better put this down in your sock because this is the last you are going to get because I have no contract with the C. I. O.' Since this statement merely recites the consequences which flow from the respondent's legal obligations as determined above, it cannot be said to constitute support of Local 1576. * * *"

For two, the statement charged to Capolino that "if you don't go with the teamsters they will quit delivery, the plant will be tied up and we will all be out of work" (Tr. 111, 140) is a privileged exercise

of the right of free speech because it carries no connotation that the respondent, as distinguished from the union, would exercise its economic power to shut down the plant. *Matter of Hagy, Harrington & Marsh,* 74 N.L.R.B. No. 242; *Matter of Electric Steel Foundry,* 74 N.L.R.B. No. 30.

C. EVEN UNDER THE GREEN BOOK ALONE, CEDAR WAS REQUIRED TO MAINTAIN MEMBERSHIP IN THE TEAMSTERS.

Gus Cedar was first employed by respondent about June, 1944. (Tr. 100.) Under the Green Book contract as it read at that time he was required to make application for membership in Local 22382, as a new employee, before starting to work. He had to complete his membership in Local 22382 within ten days. The Board states that thereafter there was no requirement that membership be maintained as a condition of continued employment. An answer to the Board's argument has recently been given by Mr. Justice Peters, writing the opinion in the case of *Silva v. Mercier,* 82 A.C.A. 742, 187 P. (2d) 60 (petition for hearing before Supreme Court granted January 27, 1948). The views expressed in that case are equally in point here.

> "The clauses of the contract in dispute are sections I and II, particularly section II. They provide:
>
> " 'Section I. Recognition of the Union: The Employer hereby recognizes the Union as the sole collective bargaining agency for all employees working for the Employer and within the juris-

diction of the Union, who are, at the time of the signing of this agreement, or thereafter become members of the Union.

" 'Section II. Employment: All non-union milkers presently employed or hereafter hired by the Employer shall make application for membership into the Union within seven (7) days from the date of the signing of this agreement, or from the date of hiring by the Employer (whichever the case may be), and each shall become a member of the Union in good standing within thirty (30) days from the date of said hiring unless the Union's action is delayed beyond said 30-day period. Whenever the Union is unable to furnish a milker in emergencies the Employer shall be free to provide his own emergency milker for the emergency but such milker must be replaced by a Union milker when one is available.

" 'Any employee suspended or expelled by the Union for violation of the Constitution and By-Laws of the Union shall, upon seven (7) days written notice being given by the Union, be laid off until such time as he shall have become reinstated in the Union.'

"It is charged in the complaint, and defendant by his demurrer admits that, at the time of filing the complaint and at the time the minute order was entered, defendant had in his employ two non-emergency non-union workers who failed to complete their membership in the union within the 30-day period specified in Section II of the contract. All notices required to be given by the union were served on the employer." * * *

"We are here dealing with a union shop agreement, not a closed shop agreement. Fundamen-

> tally, a closed shop contract requires the employer to hire only union members and to discharge non-union members. Employees, as a condition of employment, must remain union members. That is not the present contract. The union shop contract gives the employer a free hand in hiring, but requires that within a specified time, the non-union employees hired must join the union, and maintenance of such membership is a condition of continued employment. *It is quite obvious that the present contract was intended to fall within this category.*" * * * (Italics added.)

Gus Cedar was required to remain in good standing with the AFL until May, 1945, by reason of the Green Book contract, and he was equally obligated to affiliate with the teamsters after the award of the executive council of the American Federation of Labor. The existence of the closed shop condition discussed above would therefore be merely cumulative as to him.

The Board takes the view that with respect to Cedar and the closed shop question the parties were operating under a contract which was so free from ambiguity as to preclude the consideration of a union membership condition under the Green Book. (Brief, pp. 22-23.) Its position on this point is rather badly shaken, however, by the fact that most of the following two pages of the brief is devoted to an explanation of the ambiguity and uncertainty created by the Board itself in its *Bercut-Richards* decision, 65 N.L.R.B. 1052. In view of the many folios of argument presented by the Board and its representatives in numerous proceedings involving this contract in which the

Board has attempted to explain its own confusion concerning the contract, it may well be that the Board's administrative tongue is in its cheek when it refers to the Green Book's "unmistakably clear terms." (Brief, p. 23, note 24.) We submit that the evidence of the closed shop practice must be considered by the Board, either as a matter of construction of the Green Book or as proof of an agreement supplemental to it. And certainly the Board is wrong in concluding that the lack of discharges for nonmembership (Brief, p. 22; Tr. 198, 219) shows that membership was not a condition of employment; the fact is that because all employees maintained their membership there was no necessity to invoke the provision, until Cedar refused to comply in June, 1945.

CONCLUSION.

We submit that the Board's conclusions are not supported by the record.[3] The existence of a requirement of union membership as a condition of employ-

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[3]Although the Board notes that formal exceptions to the Trial Examiner's Intermediate Report were filed only by the AFL, its Brief presents the issues as though all findings of fact had been challenged by all parties. One of the points relied upon by the Board in its Statement (Tr. 80) is that the findings of fact concerning the alleged unfair labor practices "are supported by substantial evidence." All parties, furthermore, argued the Trial Examiner's conclusions in considerable detail before the Board in Washington, D.C., and it therefore appears that the Board is not attempting to invoke the rule of NLRB v. Cheney California Lumber Co., 327 U.S. 385, and similar cases in which a failure to protest findings at any stage of the proceedings before the Board is held to preclude an initial attack upon them when enforcement is sought in the Circuit Court of Appeals.

ment during the relationship with Local 22382 is uncontroverted. By reason of the award of the AFL executive council of May 3, 1945, the Teamsters Union succeeded to all the rights and interest of Local 22382 in the entire contract with respondent, including the right to maintain its standing in the plant by demanding membership as a condition of employment. With respect to the activities of the teamster representatives in the plant, commencing on May 11, 1945, whatever they did was pursuant to their rights under the Green Book. The record wholly fails to show that pressure was put on seniority people who under the Green Book may have been under no obligation to affiliate with the union. In this repect the present case differs materially from authorities, such as *N.L.R.B. v. Electric Vacuum Cleaner Co., Inc.,* 315 U. S. 685, relied upon by the Board. And if the teamsters succeeded to the contractual relationship of Local 22382, the claim that the discharge of Gus Cedar constituted an unfair labor practice would fall of necessity.

We therefore urge that the petition of the Board be denied.

Dated, Oakland, California,
November 1, 1948.

Respectfully submitted,
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